

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

TONY WRIGHT,

Plaintiff,

v.

SANDRA CARTER, *et al.*,

Defendants.

Case No. C07-5351 FDB/KLS

REPORT AND RECOMMENDATION

**NOTED FOR: December 21, 2007**

Presently before the Court is the motion to dismiss of Defendants Sandra Carter, D. Heaward and Jay Jackson. (Dkt. # 11). Defendants claim that Plaintiff is collaterally estopped from asserting exhaustion of administrative remedies as he has previously failed to demonstrate exhaustion and there has been no material change in the facts regarding that issue. (*Id.*).

In support of their motion, Defendants submit this Court's previous Order and Judgment in Case No. 06-5151RJB (Dkt. # 11, Exh. 1, 2) and the Declaration of Cherrie S. Kollmer (with Plaintiff's grievance summary) (*Id.*, Exh. 3, Attach. A). Plaintiff has responded. (Dkt. # 15). Defendants have replied. (Dkt. # 16).

After careful review of the motion, briefs, supporting declarations and documents, and balance of the record, and viewing the facts in the light most favorable to the Plaintiff, the undersigned recommends that the motion to dismiss be granted.

## I. FACTUAL BACKGROUND

### A. Procedural Background and Plaintiff's Allegations

Plaintiff is a Washington State inmate who has filed a 42 U.S.C. § 1983 civil rights action alleging that prison officials of the Clallam Bay Corrections Center (CBCC) discriminated against him because of his race. (Dkt. # 5). Plaintiff alleges that he was fired from his prison janitor job at CBCC in November 2005 because he is black. (*Id.*). This action is virtually identical to a case filed by Plaintiff in *Wright v. Carter*, Case No. C06-5151RJB (hereinafter referred to as “Wright I”). Wright I was dismissed without prejudice because Plaintiff failed to exhaust his prison grievance remedies as required by 42 U.S.C. § 1997e(a). (Dkt. # 36, 37 therein)<sup>1</sup>.

The grievance summary provided by Defendants reflects that Plaintiff has not exhausted his prison grievance remedies concerning his racial discrimination claim. (Dkt. # 11, Exh. 3, Attach. A).

### A. Plaintiff Is Barred By Collateral Estoppel From Establishing Exhaustion

Under collateral estoppel, once a court has decided an issue of fact or law, that decision normally precludes relitigation of the issue in a subsequent action involving the parties or persons in privity with the parties to the first case. *Hydranautics v. Filmtec Corp.*, 204 F.3d 880, 885 (9th Cir. 2000); *In Re Palmer*, 207 F.3d 566, 568 (9th Cir. 2000). Collateral estoppel is appropriate when the following elements are met: 1) there was a full and fair opportunity to litigate the issue in the previous action; 2) the issue was actually litigated in that action; 3) the issue was settled as a result of a final judgment in that action; and 4) the person or persons against whom collateral estoppel is asserted in the present action were a party or were in privity with a party in the

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<sup>1</sup>This Court may take judicial notice of its own files and records. *U.S. v. Author Svcs., Inc.*, 804 F.2d 1520, 1523 (9th Cir. 1986).

1 previous action. *Id.* Privity exists when the rights of a non-party or a putative non-party “were  
2 represented and protected in the prior action”. *Pedrina v. Chun*, 97 F.3d 1296, 1301-02 (9th Cir.  
3 1996). The purpose of collateral estoppel is to limit the number of times a party can be vexed by a  
4 claim or issue and to promote efficiency in the judicial system by putting an end to litigation over  
5 a particular claim or legal issue. *Gilbert v. Ben-Asher*, 900 F.2d 1407, 1410 (9th Cir. 1990).  
6

7 Defendants argue that Plaintiff is collaterally estopped from establishing that he has  
8 complied with the exhaustion requirements of 42 U.S.C. § 1997e(a) with respect to his racial  
9 discrimination claim because the Plaintiff had a full and fair opportunity to litigate this issue in  
10 Wright I.

11 In Wright I, the Court found that Plaintiff filed a grievance concerning racial  
12 discrimination. (Dkt. # 11, Exh. 1, p. 5). CBCC investigated Plaintiff’s grievance, but denied it  
13 after concluding that Plaintiff was not fired because of racial discrimination. (*Id.*). Plaintiff was  
14 informed that he could appeal to Level III by submitting a written appeal within two working  
15 days. (*Id.*). Plaintiff claimed that he completed all levels of the grievance process and submitted a  
16 document as evidence. (*Id.*) Defendants alleged that Plaintiff had falsified the document to  
17 incorrectly reflect that the grievance process was complete. (*Id.*) Plaintiff admitted that he altered  
18 the document before submitting it to the Court, but merely for the purpose of enhancing the copy.  
19 (*Id.*, p. 6).  
20

21 The Wright I Court did not find Plaintiff’s arguments persuasive and adopted the  
22 reasoning of the Magistrate Judge in his Report and Recommendation as to why the document as  
23 altered by Plaintiff was internally inconsistent. (*Id.*, p. 6). In addition, the Wright I Court  
24 analyzed and rejected Plaintiff’s claim that Defendants violated his due process and equal  
25 protection rights by not responding to his Level II complaint in a timely manner. (*Id.*, p. 6-7).  
26  
27

1 The Wright I Court concluded that Plaintiff had failed to exhaust all available  
2 administrative remedies because he had not submitted evidence showing that he appealed his  
3 grievance to Level III. (*Id.*, p. 7). The Court stated further that “[t]he issues raised by Plaintiff  
4 regarding violation of due process, violation of equal protection, and illegal discrimination are not  
5 properly before the Court at this time.” (*Id.*). The Court then dismissed Plaintiff’s case without  
6 prejudice. (*Id.*, p. 8).

8 In this case, Plaintiff argues that he attempted to exhaust his prison grievance remedies by  
9 filing his Level III grievance with the Department of Corrections (DOC) in March and April 2007  
10 and that he has exhausted his remedies because his Level III grievance was not accepted because  
11 it was untimely. Plaintiff further argues that collateral estoppel is not appropriate because the  
12 issue in Wright I was “whether racial discrimination was used in the firing of the plaintiff” and  
13 this issue was never decided in Wright I which was dismissed without prejudice. (Dkt. # 15, p. 4).  
14 Plaintiff also argues that the “DOC should not be allowed to manipulate its administrative rules  
15 and disrupt administrative efficiency and order to prohibit Mr. Wright from exhausting his Level  
16 (III) three administrative appeal.” (*Id.*, p. 5).

18 Plaintiff’s Level II grievance response dated January 26, 2006, advised Plaintiff that he  
19 had two working days after receiving the response to appeal to level III. Plaintiff missed the  
20 deadline for filing his level III appeal by well over one year. (Dkt. # 15, Exh. B, C). Prisoners  
21 must exhaust their prison grievances consistent with the rules and timeframes of the prison and  
22 failure to do so precludes the inmate from filing a lawsuit in federal court:

24 While requiring proper exhaustion serves the purposes of the PLRA, respondent’s  
25 interpretation of §1997e(a) would make the PLRA exhaustion scheme wholly  
26 ineffective. The benefits of exhaustion can be realized only if the prison grievance  
27 system is given a fair opportunity to consider the grievance. The prison grievance  
28 system will not have such an opportunity unless the grievant complies with the  
system’s critical procedural rules. A prisoner who does not want to participate in the

1 prison grievance system will have little incentive to comply with the system's  
2 procedural rules unless noncompliance carries a sanction, and under respondent's  
3 interpretation of the PLRA noncompliance carries no significant sanction. For  
4 example, a prisoner wishing to bypass available administrative remedies could  
5 simply file a late grievance without providing any reason for failing to file on time. If  
6 the prison then rejects the grievance as untimely, the prisoner could proceed directly  
7 to federal court. And acceptance of the late grievance would not thwart the  
8 prisoner's wish to bypass the administrative process; the prisoner could easily  
9 achieve this by violating other procedural rules until the prison administration has no  
10 alternative but to dismiss the grievance on procedural grounds. We are confident that  
11 the PLRA did not create such a toothless scheme.

12 *Woodford v. Ngo*, 548 U.S. \_\_\_, 126 S. Ct. 2378, 2388 (2006). Thus, the Supreme Court has  
13 rejected the argument that an inmate has complied with the exhaustion requirements of the PLRA  
14 by filing a late grievance or appeal that is properly rejected as untimely by prison officials under  
15 prison rules. *Id.*

16 In addition, Plaintiff's argument that collateral estoppel does not apply to bar his action  
17 because the issue in Wright I was whether Plaintiff was discriminated against because of his race  
18 is not correct. As noted above, the only basis for Defendants' motion to dismiss in Wright I was  
19 Plaintiff's failure to exhaust his administrative remedies under 42 U.S.C. § 1997e(a). (*See* Dkt. #  
20 36 therein)<sup>2</sup>.

21 Plaintiff did attempt to appeal his grievance to Level III after the conclusion of Wright I.  
22 However, that grievance was rejected as untimely by prison officials. Therefore, Plaintiff has  
23 only pursued his prison grievance through Level II and is barred from appealing to Level III  
24 because he failed to file a timely appeal of the Level II response.

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25 <sup>2</sup>Contrary to Plaintiff's belief, the Court's Order in Wright I did not instruct him to file a  
26 Level III complaint again. Defendants urge the Court to count this matter as a strike under 28  
27 U.S.C. § 1915 as a frivolous and/or malicious action, stating that Plaintiff acted less than honestly  
28 when he made this representation to prison officials. At this time, the undersigned prefers to give  
29 Plaintiff the benefit of the doubt that the dismissal without prejudice left him with some confusion  
30 about his ability to attempt the appeal after Wright I was dismissed.

